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SOON HAI KEE SHIPPING SDN BHD

v.

TOKIO MARINE INSURANS (MALAYSIA) BHD

B

HIGH COURT SABAH & SARAWAK, KUCHING
RAVINTHRAN PARAMAGURU JC
[SUIT NO: 22-12-2007-III]
26 MARCH 2010

C ***CONTRACT:*** *Terms - Construction of - Express warranties in marine insurance policy - Whether warranties breached*

CONTRACT: *Terms - Warranties - Express warranties - Marine insurance policy - Warranties not inserted in cover note to marine insurance policy - Warranties inserted in policy proper - Whether attention of insured drawn to such warranties when negotiating policy of insurance - Whether warranties incorporated into the policy of insurance - Whether such policy of insurance subject to the warranties - Whether warranties breached*

D

E ***INSURANCE:*** *Marine insurance - Express warranties - Warranties contained in policy proper but not in cover note - Whether attention of insured drawn to warranties when negotiating the policy - Whether such warranties properly incorporated into the policy - Whether such warranties breached*

F

INSURANCE: *Marine insurance - Sue and labour clause - Salvage costs - Salvage agreement on 'no cure no pay' basis - Salvage unsuccessful - Invoices, bills and receipts unverified - Invoices, bills and receipts inconsistent with claim for salvage costs - Whether such costs recoverable under the sue and labour clause - Whether insured had proved salvage costs*

G

SHIPPING AND NAVIGATION: *Marine insurance - Policy - Sue and labour clause - Salvage costs - Salvage agreement on 'no cure no pay' basis - Salvage unsuccessful - Invoices, bills and receipts unverified - Invoices, bills and receipts inconsistent with claim for salvage costs - Whether such costs recoverable under the sue and labour clause - Whether insured had proved salvage costs*

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I

SHIPPING AND NAVIGATION: *Marine insurance - Policy - Warranties - Express warranties - Warranties not inserted in cover note to policy but inserted in policy proper - Whether insured's attention had been drawn to such warranties when negotiating the policy - Whether such policy of insurance subject to the warranties*

SHIPPING AND NAVIGATION: *Merchant shipping - Master of ship - Competency of - Master certified under Sarawak Merchant Shipping Ordinance 1960 - Whether such master bound by revalidation requirements under the MSTC Rules 1999 made under West Malaysian Merchant Shipping Ordinance 1952*

SHIPPING AND NAVIGATION: *Merchant shipping - Master, officers and crew - Warranty in marine insurance policy requiring vessel to be properly officered and manned - Whether such warranty required master's revalidation of certificate of competency*

The plaintiff's ship ('the vessel') was insured for RM800,000 against the perils of the sea under a policy issued by the defendant on 23 March 2005. The defendant issued a cover-note to the plaintiff on 23 March 2005 but only sent the policy to the plaintiff two weeks later. On 24 March 2005, the vessel sank after hitting some object in the sea. The plaintiff reported the sinking to the defendant on 26 March 2005. The defendant denied liability on the basis that the defendant had breached express warranties in the policy. The warranties related *inter alia* to the ship being properly licensed and/or registered with the appropriate authorities and the ship being reasonably maintained and properly 'officered and manned'. The defendant contended that the plaintiff had breached the warranties in that the plaintiff's master and crew of the vessel were not properly licensed or certified by the Marine Department. Further, the plaintiff's master did not possess a valid certificate of competency under the MSTC Rules 1999 resulting in the vessel not being properly 'officered and manned'. The plaintiff brought the instant action against the defendant for the insured sum of RM800,000 and a further sum of RM228,000 as cost of attempting to salvage the vessel. The plaintiff denied that the express warranties were part of the defendant's policy since the warranties were not contained in the cover note issued on 23 March 2005. The issues for the High Court were whether the warranties were inserted into the policy after the issuance of the cover note and whether the certificate of competency of the master of the vessel was valid.

Held (allowing the plaintiff's claim in part with costs):

(1) The evidence adduced by the plaintiff clearly showed that the cover note issued to the plaintiff was subject to the warranties in the policy and that the plaintiff's attention had been drawn to it. The cover note thus had incorporated all the terms and conditions in the policy and included the express warranties in question. (paras 13 & 14)

(2) Concerning the first warranty - that the vessel was to be properly licensed and/or registered - the plain words of the warranty were that the insured vessel had to be properly licensed and certified by the Marine Department. The word 'vessel' was not defined in the policy or in any regulation to include a properly licensed master and crew. In the instant case, the vessel in question had been properly registered and issued with a Certificate of Malaysian Registry in accordance with law. There was no suggestion that the vessel was not properly registered and certified. Thus, the argument that the first warranty had been breached was without merit. (paras 15 & 16)

(3) The plaintiff's master was properly issued with a certificate of competency in 1986 under s. 5 of the Sarawak Merchant Shipping Ordinance 1960 - a valid law. The MSTC Rules 1999 made under the West Malaysian Merchant Shipping Ordinance 1952 which *inter alia* requires revalidation of competency, did not apply to render the master's certificate invalid. (paras 26 & 27)

(4) There could be no breach of the warranty on the vessel being properly 'officered and manned' since the warranty did not specifically require a master's revalidation of the certificate of competency. It also could not be said that the plaintiff's master was not competent, qualified or not a certified master. (paras 28 & 29)

(5) The plaintiff had not proved its claim for the RM228,000 salvage expenses. Thus, its claim for the same failed. The plaintiff had however proved on a balance of probabilities that its vessel was lost as a result of the perils of the sea. The defendant's defence that the plaintiff had breached the warranties was not proved and thus the plaintiff's claim for the RM800,000 would attach to the policy. (paras 30 & 31)

Case(s) referred to:
The "Melanie" United Oriental Assurance Sdn Bhd Kuantan v. WM Mazzarol [1984] 1 LNS 41 FC ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 5
Evidence Act 1950, ss. 103, 114(e)
Merchant Shipping (Training and Certification) Rules 1999, rr. 42(3), 46
Merchant Shipping Ordinance 1952, ss. 71, 473A, 473B, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483A, 483B, 483C, 484, 485A
Merchant Shipping Ordinance 1960 (Sarawak), ss. 5, 12, 14
Marine Insurance Act 1906 [UK], ss. 22, 33, 35(2), 34(3)

For the plaintiff - Albert Tang; M/s Chew, Jugah, Wan Ullok & Co Advocates
For the defendant - Olivia Ngu; M/s SK Ling Advocates

Reported by Andrew Christopher Simon

JUDGMENT

Ravinthran Paramaguru JC:

Introduction

[1] This is a claim under a marine insurance policy. The plaintiff is the owner of a ship known as the MV Song Kian Baru. The defendant is the insurer. The ship was insured under a Marine Hull and Machinery Insurance policy for RM800,000 on 23 March 2005. The policy insured the ship against the perils of the sea. It is a cover under what is known as the Institute Time Clauses (Hull) 1983. This means that the policy contained the standardised clauses that were originally developed by the Institute of London Underwriters which is an association representing the marine insurance companies and Lloyd's underwriters operating in London. The vessel sank the following day (24 March 2005) when it hit some hard object in the sea. The plaintiff allegedly spent RM228,000 in an attempt to refloat the vessel but failed. They are now claiming for the insured sum of RM800,000 and RM228,000 as the cost of attempting to salvage the ship. The sinking of the ship was reported to the defendant on 26 March 2005. On 25 September 2005, the defendant denied liability on the ground that plaintiff breached expressed warranties in the policy, in particular the warranty that the ship should be reasonably and properly "officered

A and manned". The defendant's case is that the "certificate of competency" of the Master had expired and therefore the ship was not properly "officered". Predictably, the entire case turns on two issues, ie, the applicability of the said warranty which was inserted into the policy after the issuance of the cover note and the validity
B of the certificate of competency of the master.

Plaintiff's Case

[2] The facts pertaining to this case are largely not in dispute. The plaintiff called five witnesses to present its case. The first
C witness was its director (Yii Ming Chee, PW1). The second witness (Ngu Kow Voon @ Lawrence Ngu, PW2) was the authorised insurance agent of the defendant. The third witness (Bujang bin Ramli, PW3) was the salvor who attempted to refloat the ship. The fourth witness (Ting Ing Houng, PW4) was the shipping industry
D executive who gave an opinion to the plaintiff about the cost of salvaging the ship. The fifth witness (Sahari Hassan, PW5) was the last master of the ill-fated ship in question.

[3] The ship in question, the "MV Song Kian Baru" was built
E in 1996 in Sibu. Its tonnage was 361 tons. The ship was properly registered with the Registrar of Malaysian Ships in Kuching and was issued with a registration certificate. For purpose of obtaining insurance cover, PW1 dealt with PW2 sometime in March of 2005. The cover note was issued by the defendant on 23 March 2005 after
F receiving the proposal form from PW2. The insurance policy itself was only sent to the plaintiff about two weeks later. It is dated 5 April 2005. PW1 insured the ship for RM800,000. The breakdown of the coverage is as follows:

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On Hull & Fittings	RM500,000
On Engine	RM150,000
On Crane	RM150,000

H **[4]** He paid a premium of RM20,026. This premium was not refunded by the defendant despite repudiation of liability. PW1 testified that the plaintiff engaged Sahari Hassan as the Master of the ship with the approval of the Marine Department in Miri. The Marine Department endorsed the reverse side of the Certificate of
I Malaysian Registry of the vessel with the name of Sahari Hassan as the master. The endorsement was made on 22 September 2005

which is the day he was engaged as the master of the ship. After the vessel sank, PW1 attempted to salvage it. He engaged PW3 who is experienced salvor. He accepted a reduced quotation of RM80,000 to salvage the ship. However all attempts to refloat the ship failed. In the course of the salvaging operations, PW1 commissioned PW4 to give an opinion on the viability of continuing attempts to refloat the ship. PW4 told him that it would cost RM400,000 to RM500,000 to repair the boat after salvage. This opinion convinced him to abandon efforts to salvage the ship. By then, the plaintiff claimed that he had spent a total of RM228,000 between April 2005 to October 2005 to salvage the ship.

Defendant's Case

[5] The defendant called three witnesses. The first witness (Lim Teck Sin, DW1) was an insurance surveyor from KASI (Malaysia) Sdn Bhd. He prepared the preliminary and final report on the loss of the ship. In his witness statement, he said that the charts for voyage, magnetic compass and deviation card were not on board. However, I need not deal with this aspect of his evidence as the learned defence counsel did not raise these issues in her final submission. The defendant had appointed KASI (Malaysia) Sdn Bhd as the loss adjuster to investigate and report the claim submitted by plaintiff. The second witness (Jason Joenoi DW2) was the general manager of KASI (Malaysia) Sdn Bhd in Kota Kinabalu. He told the court that he asked the plaintiff to salvage the vessel but he did not receive quotations or a claim bill for the salvaging operations before the final report was prepared. The third witness (Yee Quee Gee, DW3) was the general manager of the claims department of the defendant. The defendant has not denied accepting the proposal form in question and issuing an insurance cover note for the plaintiff's ship for the sum of RM800,000 under Institute Time Clauses (Hull) 1983 with a deductible of RM35,000. The defendant has also not disputed that the ship sank and that the plaintiff failed to salvage it. However, it is the case of the defendant that the plaintiff breached express warranties of the Marine Hull policy. The cover note stated that:

> The cover hereby granted is subject to all terms exceptions and conditions of the Company's usual Policy Form for this class of business

[6] The policy, which was issued within 30 days of the cover note, contained the following warranties in the Hull & Machinery Endorsement Schedule which is part of the policy:

1. Warranted that the vessel be properly licensed and/or registered with the appropriate government marine department whose rules and regulations must be complied with at all times; failure to do so shall render this policy null and void.
2. Warranted that the maximum loadline be observed.
3. Warranted Malaysian government loadline maintained.
4. Warranted vessel under government survey and all requirements complied with during the currency of this policy.
5. Warranted vessel be surveyed annually.
6. Warranted vessel be properly and reasonably maintained, equipped, kept-up, officered and manned during the currency of this policy.

[7] In her final submission, the counsel for defendant relied on the first and last warranty to repudiate liability.

Issues

[8] In the statement of defence, the defendant has raised a number of issues which includes the defence that the navigational charts and magnetic compass were not placed on the ship. However, in the final submissions, counsel for defendant only raised the following defences:

(a) That the plaintiff was in breach of express warranties which are part of the policy.

(b) They are not liable to pay for the sue and labour expenses as the quotations for the salvage efforts were not supplied to them and that the expenses were not proved.

[9] In the premises, counsel for plaintiff is right to treat the other defences raised in the statement of defence as abandoned.

Whether The Express Warranties Form Part Of The Policy?

[10] Before the question of breach of any express warranties can be considered, the preliminary issue that was raised by the plaintiff is

whether the express warranties form part of the marine hull policy in question. The plaintiff's case is that it is not part of the policy. Their grounds are as follows:

(1) The impugned express warranties were incorporated After the 'contract of insurance' has been concluded.

(2) The Cover Note does not contain the impugned express warranties, and this is against section 35(2) MIA 1906, and it is fatal.

(3) The wordings "The cover hereby granted is subject to all terms exceptions and conditions of the Company's usual Policy Form for this class of business" could not incorporate the impugned express warranties because standard Policy Forms do not contain them.

(4) The Defendant failed to adduce any evidence to show what is the "Company's usual Policy Form for this class of business".

[11] From the submission of the parties, it is common ground that the English Marine Insurance Act 1906 is applicable in Malaysia by virtue of s. 5 of the Civil Law Act 1956 (see the decision of the Federal Court in *The"Melanie" United Oriental Assurance Sdn. Bhd. Kuantan v. WM Mazzarol* [1984] 1 LNS 41. The defendant has argued that it is the practice for marine insurance policies to be issued after the contract of insurance is signed or after the cover note is confirmed and that this is sanctioned by s. 22 of the Marine Insurance Act 1906. Section 22 of the Marine Insurance Act 1906 reads as follows:

22. Subject to the provisions of any statute, a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with this Act. The policy may be executed and issued either at the time when the contract is concluded, or afterwards.

[12] There is no dispute that the warranties in question were not stated on the cover note but were incorporated into the marine insurance policy that was issued two weeks later. Counsel for plaintiff has argued that since the express warranties were not included in the cover note, s. 35(2) of the Marine Insurance Act 1906 has been breached. Section 35 of the Marine Insurance Act 1906 reads as follows:

35. Express warranties

(1) An express warranty may be in any form of words from which the intention to warrant is to be inferred.

(2) An express warranty must be included in, or written upon, the policy, or must be contained in some document incorporated by reference into the policy.

(3) An express warranty does not exclude an implied warranty, unless it be inconsistent therewith.

[13] With respect, my reading of sub-s. (2) does not support the argument of learned counsel for plaintiff. The provision does not say that for express warranties to be effective, they must be included in the cover note. It merely says that an express warranty must be included in the policy which was exactly the case here. Section 22 allows a policy to be issued after a contract of insurance is concluded. PW2, the agent of the defendant who was called as witness by the plaintiff testified that the cover note he issued was subject to the warranties in the policy. He also said he brought the existence of the warranties to the attention of the plaintiff. His evidence on this point is as follows:

Q: Are you aware of express warranty in the insurance policy?

A: Yes.

Q: Do you agree, this kind of express warranty is very general in insurance policy?

A: Yes.

Q: Did you inform your client?

A: Yes.

Q: When?

A: Before quotation.

[14] Therefore, there is evidence before the court from the plaintiff's own witness that the express warranties are general in nature and that his attention has been drawn to it. Counsel for plaintiff submitted that there is no evidence that these warranties are "usual" for the policy in question. It is obvious from the answer of PW2 that are quoted above that he used the word "general" to mean that the warranties in question are "usual" and that he had

explained them to his client. During re-examination, he made an about turn and denied doing so. However, on a balance of probabilities I find that he had explained to his client about the express warranties. He is an experienced insurance man and he was confident earlier about having explained the express warranties to his client. I therefore find that the cover note had incorporated all the terms and conditions in the marine insurance policy and that it included the express warranties in question.

Whether The Warranties Have Been Breached?

First Warranty

[15] The defendant is relying on the first and last warranty to argue that the claim did not attach. The first warranty is as follows:

> Warranted that the vessel be properly licensed and/or registered with the appropriate government marine department whose rules and regulations must be complied with at all times; failure to do so shall render this policy null and void.

[16] Counsel for defendant submitted that under this warranty the plaintiff must not only possess proper certification and documentation for the ship in order to comply with the applicable rules and regulations but also ensure that the master and crew must be properly licensed or certified by the Marine Department. He urged the court to adopt a business like approach to the interpretation of express warranties. He said express warranties should be interpreted in the same way as any contractual term in a commercial contract, ie, in accordance with the intention of the parties to the contract and in the light of commercial practices and trade usages. I agree with counsel for defendant that in interpreting commercial contracts, the courts generally adopt a business like approach. However, to my mind, the plain words of the above warranty do not support the argument of counsel for defendant. The warranty is clearly in respect of the licensing and registration of the vessel in accordance with Marine Department regulations. "Vessel" is not defined in the policy or in any regulation to include a properly licensed master and crew. Indeed, if vessel is defined in those terms, it follows that the Marine Department will not be able register any vessel and issue a certificate unless the master and crew are identified. This means that every time a vessel owner hires a new master or crew member, he must reapply for a fresh certificate for the vessel. The plains words of this warranty are that the insured vessel must be properly licensed and certified by the Marine

Department. In this case, the vessel in question has been properly registered and issued with a Certificate of Malaysian Registry in accordance with the law. There is no suggestion that the vessel was not properly registered and certified. In the premises, the argument that the first warranty had been breached is without merit.

Last Warranty

[17] The last warranty reads as follows:

> Warranted vessel be properly and reasonably maintained, equipped, kept-up, officered and manned during the currency of this policy.

[18] Counsel for defendant only relied on the "officered and manned" limb of the warranty to argue that there was a breach. He said "officered and manned" means that master of the ship must possess a valid certificate of competency at the material time. He said that the master of the MV Song Kian Baru did not possess a valid certificate of competency. The master of vessel at the material time was Encik Sahari Hassan. It is common ground that he possessed a certificate of competency since 1986. The certificate of competency was produced in court. It was issued under the Sarawak Merchant Shipping Ordinance 1960 (the Sarawak Ordinance). The defendant has also not questioned the qualification or experience of Encik Sahari Hassan. At the material time, the vessel's certificate was endorsed with the name of Encik Sahari Hassan as the master by the Marine Department. There is also no dispute that the Marine Department is the regulatory body for all seagoing vessels and its officers and crew. Counsel for defendant argued that Encik Sahari Hassan did not possess a valid certificate of competency for the following reason. The Merchant Shipping (Training and Certification) Rules 1999 (The MSTC Rules 1999) was made under s. 71 of the Merchant Shipping Ordinance 1952. This pre-Malaysia Ordinance, save for a few provisions, only applies in West Malaysia. The MSTC Rules 1999 were made in order to comply with the country's obligations under International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978 (known as the STCW Convention in the MSTC Rules 1999). Rule 42 of the MSTC Rules 1999 provided for revalidation of an existing Certificate of competency:

> 42. Revalidation of certificate.
>
> (1) Every master, officer and radio operator holding an appropriate certificate issued under Part II and III and under rules 26, 27 and 28 and who is serving at sea or intends to

return to sea after a period ashore shall, in order to qualify for a sea-going service, be required at intervals not exceeding 5 years to: A

(a) meet the standards of medical fitness prescribed by the Merchant Shipping (Medical Examination) Rules 1999 [P.U.(A)127/99]; and' B

(b) meet the conditions as specified by the Director.

(2) Every master, officer and radio operator shall, for continuing a sea-going service on board a ship, successfully complete an approved refresher training at such intervals as specified by the Director. C

(3) The holder of a certificate issued before the coming into operation of these Rules that requires revalidation under subrule (1) shall comply with the requirements as specified by the Director and the holder who fails to comply with the requirements shall have the certificate revalidated only up to 1 February 2002. D

[19] It must be noted that this section states that certificates issued before the coming into operation of the MSTC Rules 1999 E shall be revalidated only up to 1 February 2002 since the holders of the certificates have to comply with training requirements set by the Director of Marine Department. The defendant also included in the bundle of documents a notice called the Marine Information and Guidance Note that was sent to all ship-owners and masters in F 2003. The notice states that officers of vessels must undertake several training modules and that upon successful completion they will get their certificates of competency issued prior to 2003 re-validated or converted. When questioned in court, Encik Sahari Hassan candidly admitted that he did not undergo any training G organised by the Marine Department pursuant to the STCW Convention. Counsel for defendant submitted that therefore his certificate of competency had not been revalidated in accordance with the MSTC Rules 1999. Therefore it follows that his certificate of competency was not valid at the material time and this means H that the MV Song Kian Baru was not "properly officered" when it sank. Counsel for defendant submitted that this is a breach of the express warranty contained in the policy. As summarized above, the defendant is relying on the MSTC Rules 1999 and the said notice and guidance note of the Marine Department that was sent to the I

A Ship owners and masters to argue that Encik Sahari Hassan's certificate of competency is not valid. The plaintiff's argument on this point is as follows.

[20] Counsel for plaintiff submitted that, regardless of the B applicability of the MSTC Rules 1999, the Marine Department had endorsed the Song Kian Baru's certificate with the name Encik Sahari Hassan as the master as late as in 2005. This is an official act and therefore must be presumed valid under s. 114(e) of the Evidence Act 1950. Furthermore, the Marine Department officers C were not called to testify that the certificate of competency of Encik Sahari Hassan is not valid. Therefore, no evidence was placed before the court to support the argument that the certificate was not valid. Counsel for plaintiff also submitted that the Director of the Marine Department could have exempted Encik Sahari Hassan under r. 46 D from undergoing the requisite training modules. Rule 46 reads as follows:

> 46. Power to exempt.
>
> A Director may, in respect of a ship other than a passenger ship of E more than 500 GT which is engaged on an international voyage and a tanker, if he considers that the ship's size and the length or character of its voyage is such that it renders the application of the full requirements of these Rules unreasonable or impracticable, exempt to that extent the master, officer or seamen on such ship or F tanker from some of the requirements, bearing in mind the safety of the people on board the ship or tanker and property and the protection of the marine environment.

[21] After the sinking of the MV Song Kian Baru, Encik Sahari Hassan worked on another vessel called "The Yung Fah". The G Marine Department cancelled the endorsement of Encik Sahari Hassan as the master of this vessel. By an email letter dated 29 July 2005, they informed the loss adjuster that Encik Sahari Hassan was not allowed to serve as a master as his certificate of competency was not revalidated. Counsel for plaintiff also argued H that the certificate of competency of Encik Sahari Hassan was submitted at the outset of the application for insurance to the agent of the defendant. Therefore by accepting the insurance proposal, the defendant had waived any irregularity in respect of the validity of the certificate of competency of Encik Sahari Hassan.

I

Issues In Respect Of The Certificate Of Competency

[22] Before considering the validity of the certificate of competency from the standpoint of the MSTC Rules 1999, I shall first consider the other issues submitted by the parties.

Marine Department Letter Dated 29 July 2005

[23] The defendant relied on the letter dated 29 July 2005 from the Marine Director to argue that the certificate of competency is not valid. This letter enclosed an email letter from the Assistant Director to the Director of the Marine Department. In my opinion, the reliance of the defendant on this email is misplaced. This e-mail letter was only issued after the sinking of the MV Song Kian Baru and after the loss adjustor commenced investigations into the validity of the certificate of competency. The letter does not categorically state that the certificate of competency of Encik Sahari Hassan is not valid or that the Marine Department had taken an overt act to revoke it. It only says that Encik Sahari "is not allowed to serve as Master" because his certificate was not endorsed in accordance with MSTC Rules 1999. It is a point to note that the Marine Department had endorsed him to be the master of the MV Song Kian Baru. There is no explanation why they endorsed him in 2005 as the master of the said vessel. Furthermore, the truth of the content of the letter was not proved as the maker was not called.

Whether Any Waiver On The Certificate Of Competency?

[24] Counsel for plaintiff submitted that the defendant had waived the question of the validity of certificate of competency since it was supplied to their agent at the time of the insurance proposal. The argument is that since the defendant knew about the status of the certificate and they chose to enter into the contract of insurance, they had waived their right to rely on this warranty to repudiate the policy. Section 34(3) of the English Marine Insurance Act 1906 provides that a 'A breach of warranty may be waived by the insurer". The onus of establishing any waiver rests on the plaintiff. However, the plaintiff cannot argue that there was waiver in this case as there is no evidence at all that the defendant had waived the warranty in question. In my opinion, mere acceptance of the insurance premium at the formation of the contract or issuance of the cover note cannot amount to a waiver. The defendant was under

A no duty to ensure that certificate of competency was valid. Assuming for sake of argument that the warranty requires that the master of a vessel must possess a revalidated certificate of competency in compliance with the MSTC Rules 1999, it follows that the possession of such a certificate of competency on the part
B of the master becomes a condition precedent to the attaching of risk. Therefore, it would be the duty of the plaintiff to comply with this condition precedent.

Whether Encik Sahari Hassan Was Exempted Under r. 46?

C **[25]** There is clear evidence that Encik Sahari Hassan was not exempted as he himself testified during cross-examination that he did not received any exemption letter from the Marine Department. In any event, the fact whether he had been exempted or otherwise is a fact that should be within his knowledge and therefore the
D burden is on him to produce the exemption letter (see s. 103 of the Evidence Act 1950). The submission of counsel for plaintiff that he may have been exempted is pure speculation.

Whether There Is Evidence That The Certificate Had Expired?

E **[26]** This issue is at the core of the defence. The burden to establish that an express warranty has been breached and that the claim does not attach lies on the insurer. The case of the defendant that the certificate of competency was invalid is based on the
F MSTC Rules 1999. Encik Sahari Hassan was properly issued with a certificate of competency in 1986. The defendant has not disputed this fact. The MSTC Rules 1999 provides for compulsory training of masters before the certificate of competency can be revalidated. Encik Sahari Hassan admitted that he did not attend any training
G course that had been approved by the Marine Department to revalidate his certificate. The argument that he was exempted under r. 46 cannot hold water because Encik Sahari Hassan himself told the court that he did not receive any exemption letter from the Marine Department. So the issue that is left for determination is
H whether the MSTC Rules 1999 had rendered Encik Sahari Hassan's certificate of competency invalid. A reading of r. 42 suggests that attendance at training courses prescribed by the Marine Department Director is mandatory as otherwise a certificate of competency cannot be revalidated beyond 1 February 2002. By necessary
I implication, this means that the certificate of competency of Encik Sahari Hassan was invalid by the time he entered into the contract

of insurance in question. However, there is much merit in the submission of counsel for plaintiff that r. 42 did not invalidate the certificate of competency of Encik Sahari Hassan. To understand this argument in its proper context, a little historical digression is necessary. The MSTC Rules 1999 were made under s. 71 of Part III of the Merchant Shipping Ordinance 1952 (The West Malaysian Ordinance). Part III is subtitled "Masters and Seaman". Section 71 of the West Malaysian Ordinance states that the Minister may make rules in respect of the qualifications of the officers and seaman. In 1952, the Ordinance only applied to the states of Malaya as the Borneo States of Sabah and Sarawak had yet to form the reconstituted Federation of Malaysia. The prevailing maritime law in Sarawak at the time of its accession in 1963 to the newly formed Federation of Malaysia was the Merchant Shipping Ordinance of 1960 (the Sarawak Ordinance). The Sarawak Ordinance has not been repealed until now and is still valid law although it covers the same subject matter as the West Malaysian Ordinance. In fact both counsel for plaintiff and defendant agreed that the Sarawak Ordinance has not been repealed. However, through a series of amendments, some provisions of the West Malaysian Ordinance have been incorporated into the Sarawak Ordinance. For example, Act A603 which was passed in 1984, deleted all references to "British ship" and "Sarawak ship" and substituted them with "Malaysian ship". In the same amending Act, ss. 473A to 485A of the West Malaysian Ordinance was extended to Sabah and Sarawak. The Merchant Shipping (Amendment and Extension) Act 2007, which has yet to be enforced has repealed any Sarawak law which is consistent with Part V of the West Malaysian Ordinance. Sections 473A to 485A of the West Malaysian Ordinance deals with licensing of boats and fares whereas Part V deals with safety measures. The Certificate of competency of Encik Sahari Hassan exhibited in court states it was issued under s. 5 of Part III of the Sarawak Ordinance. Part III of the Sarawak Ordinance is subtitled "Competency of Masters and Crew and Certificates thereof". Section 12 gives the power to the Director of the Marine Department to prescribe examinations before issuing certificates of competency. Section 14 provides for revocation of certificates. Therefore, as can be seen, Part III of Sarawak Ordinance contains provisions for the issuance and revocation of the certificates issued in Sarawak. Part III of the Sarawak Ordinance is valid as it has not been repealed. Part III of the West Malaysian Ordinance which deals with issuance of "Certificate of competency and qualification of masters and seamen"

A has not been extended to Sarawak. Therefore, the question that arises is, whether Encik Sahari Hassan's certificate of competency which was issued under the Sarawak Ordinance is rendered invalid by the MSTC Rules 1999 made under West Malaysian Ordinance. Rule 42 itself implies that it does not apply to a certificate of
B competency issued under the Sarawak Ordinance. Rule 42(3) begins in these words:

> The holder of a certificate issued before the coming into operation of these Rules ... .

C **[27]** The MSTC Rules 1999 were made under the West Malaysian Ordinance. Therefore, reference to "a certificate" in sub-r. (3), unless otherwise indicated, must necessarily refer to a certificate issued under Part III of the West Malaysian Ordinance. It is essential to note that Encik Sahari Hassan's certificate of
D competency in 1986 was still issued by the Marine Department under s. 5 of the Sarawak Ordinance. This means that the Marine Department was enforcing the Sarawak Ordinance in the matter of issuing a certificate of competency. In fact, the endorsement of Encik Sahari Hassan as the master of the Song Kian Baru by the
E Sarawak Marine Department as recently as 2005 is indicative of the fact that the Marine Department did not consider itself bound by r. 42 as it must have been within their knowledge that Encik Sahari Hassan did not attend any training course for re-validation of his certificate. Counsel for defendant submitted that MSTC Rules 1999
F applied to all "Malaysian ships" and Sarawak ships come within this meaning. That may well be true but Part III of the West Malaysian Ordinance is not in respect of regulation of ships alone. It is about issuance and revocation of certificates. Encik Sahari Hassan's certificate is issued under Part III of the Sarawak Ordinance and it
G still valid law. Moreover, r. 42 which provides for automatic expiry of a certificate applies only to a certificate issued under the parent Ordinance. In the premises, the argument of counsel for defendant, that the certificate of competency of Encik Sahari Hassan was not valid at the material time lacks merit.

H

Whether The Warranty Refers To The Certificate Of Competency?

[28] Even if the certificate of competency of Encik Sahari is
I considered invalid, I am of the opinion that there is no breach of the warranty in question for the following reason. Learned Counsel for plaintiff also submitted that the term "properly and reasonably

officered and manned" is ambiguous in that it need not necessarily refer to the certificate of competency of Encik Sahari Hassan. Counsel for defendant argued that the words of the warranty means that the vessel must have a qualified and competent Master and crew, including the minimum number crew to serve on board the vessel. This meaning makes sense because an incompetent master and crew would expose a vessel to navigational hazards in the open sea. However, there is nothing in this warranty that requires the master to possess a re-validated certificate of competency. As for the competency of Encik Sahari, it cannot be said that Encik Sahari Hassan is not competent, qualified or that he is not a certified master. He has been a master since 1986 and his experience and competency has not been questioned by defendant. The Sarawak Marine Department which is the regulatory body for masters and seaman in Sarawak had tacitly acknowledged the validity and currency of his certificate of competency by endorsing him as the master of the MV Song Kian Baru. Counsel for defendant also argued that a warranty is a condition which must be exactly complied with under s. 33 of the Marine Insurance Act 1906. Therefore, the question arises as to what is meant by exact compliance with the warranty in question as it did not specifically require revalidation of the Certificate of competency. Therefore on this score as well, the argument that the warranty was breached does not succeed.

[29] In view of my ruling that the warranty has not been breached, the defendant cannot repudiate liability. I therefore find that they are liable to indemnify the plaintiff for the insured amount of RM800,000.

Sue And Labour

[30] The insurance policy contained a "sue and labour" clause. This is a standard clause in a maritime insurance policy which allows the insured to recover from the insurer any reasonable expenses incurred by the insured to salvage the vessel. It is an incentive to mitigate any loss or damage to the property insured under the policy. PW1 testified that the plaintiff spent RM228,000 between April 2005 to October 2005 in attempts to salvage the ship. He also called a salvor (PW3) who had attempted to refloat the ship for a fee of RM80,000. He had apparently charged RM80,000 as his fee. However, PW3 said that he did not issue any invoice or receipt when he received payment. He merely wrote it in his note

book. The amount of fee he allegedly charged is a huge sum. If the charge was genuinely incurred and the plaintiff intended to claim under the "sue and labour" clause from the insurers, it is surprising that no proper receipt was obtained from PW3. The claim appears doubtful as well because the previous quotations for refloating the ship was on a "no cure no pay" basis which means that salvor would receive no reward if no property is salved. In respect of the balance, the disputed receipts do not match up to the claim. The defendant's general manager also confirmed that before liability was repudiated, the plaintiff did not furnish complete invoices and receipts to his office for verification. The main point would however, be that the bills in the disputed bundles do not tally with the claim. The burden is on the plaintiff to prove the sue and labour charges. As they failed to do that, the claim of RM228,000 fails.

[31] In conclusion, the plaintiff had proved on a balance of probabilities that the MV Song Kian Baru was lost as a result of a peril of the sea. The defence that the plaintiff breached the express warranties was not proven. Therefore the claim attaches to the policy. The plaintiff is therefore entitled to judgment in the sum of RM800,000 with interest of 8% from 3 October 2005 until full and final settlement. Costs to the plaintiff to be taxed unless otherwise agreed.